BEFORE THE INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

GOSHEN EDUCATION ASSOCIATION, et al.,)	
Complainants,)	
and)	Case No. U-00-03-2315
anu)	Case No. 0-00-03-2313
BOARD OF SCHOOL TRUSTEES OF THE)	
GOSHEN COMMUNITY SCHOOLS,)	
)	
Respondent.)	

HEARING EXAMINER'S REPORT

Pursuant to the pleadings in the above-captioned case, upon the basis of the parties' Joint Stipulations, upon the basis of evidence adduced at a hearing held in the School Corporation's Administration Building in Goshen, Indiana, on February 20, 2001, and upon his evaluation of the credibility of the witnesses, consideration of pre- and post-hearing briefs submitted by the parties, and the applicable law, the Hearing Examiner now makes the following:

FINDINGS AND CONCLUSIONS OF FACT

- 1. The Complainant Goshen Education Association ("Association"), at all times material, was a "school employee organization" as that term is defined by Section 2(k) of the Indiana Code 20-7.5-1, Public Law 217-1973 ("Act").
- 2. The Respondent Board of School Trustees of the Goshen Community Schools ("School Corporation"), at all times material, was a "school employer" as that term is defined by Section 2(c) of the Act.
- 3. Complainant Thomas Holtzinger, who signed the "Complaint for Unfair Practice" herein under oath, was a "school employee" of the School Corporation as the term "school employee" is defined by Section 2(e) of the Act and, at all times material, was co-president of the Association.
- 4. The Association, at all times material, was the "exclusive representative" of the School Corporation's school employees as the term "exclusive representative" is defined by Section 2(l) of the Act.
- 5. Dr. Kenneth Blad was superintendent of the School Corporation from January, 1990 through

December, 1997.

- 6. Dr. Kent Evans became superintendent in January, 1998. He continues to serve in that position. From at least January, 1990, until January, 1998, Dr. Evans served as deputy superintendent.
- 7. Dr. Bruce Stahly became the School Corporation's deputy superintendent in April, 1998, and continues to serve in that position. Stahly oversees the School Corporation's financial affairs, its buildings and grounds, its student transportation system, and its technology. In this case, Stahly assembled and explained School Corporation documents dating from 1991 through 2000.
- 8. The evidence in this case shows that no School Corporation official acted in bad faith. The evidence further shows that no School Corporation official intentionally engaged in any wrongful conduct.

Of equal import, the Association's counsel, in his opening statement, similarly emphasized that the Association was not alleging herein that the School Corporation intentionally committed any wrongful act. The Association's counsel stated:

- ... I do want to say publicly that we are not contending that there was any bad faith here on the part of any school administrator or any school board member. We don't contend that there was any intentional misconduct on the part of anyone.
- 9. Stahly first learned that there was a potential problem soon after he arrived in 1998. Claims that year were high, and the School Corporation had to make all of its premium payments to pay those claims. The School Corporation first advised the Association of the potential problem in May, 1998.
- 10. From approximately 1986 through calendar year 1999, the School Corporation operated a self-insured health insurance program ("self-insured plan").
- 11. The School Corporation's monies to support the self-insured plan for the teachers came from the general fund (and from other funds out of which employee compensation and benefit costs were paid).
- 12. Payments to support the self-insured plan were made by the School Corporation to an account called the 110 account or the self-insurance fund ("self-insurance fund").
- 13. The self-insurance fund was not a separate bank account. Instead, it was an internal account within the chart of accounts of the School Corporation.
- 14. Funds were paid from the self-insurance fund to the health insurance trust fund ("trust account"), which was a separate bank account held by Key Trust Company of Indiana, N.A.

- 15. Once funds were deposited in the self-insurance fund or in the trust account they were never returned to the general fund.¹
- 16. The School Corporation employed Pyramid Benefits as a third-party administrator.
- 17. Pyramid reviewed claims to determine coverage and limits. Then Pyramid drew funds from the Key trust account to pay medical providers. All claims and expenses of the self-insured plan were paid from the trust account.
- 18. When the third-party administrator determined that additional funds were needed in the trust account, it contacted the School Corporation. Funds were then transferred by the School Corporation from the self-insurance fund to the trust account.
- 19. With the knowledge and anticipation of the Association, the School Corporation purchased stop-loss or excess loss insurance through Security Life of Denver to protect against catastrophic losses.
- 20. Two separate types of insurance were purchased.
- 21. One type, called specific stop-loss or excess loss insurance, paid claims on any individual participant over \$100,000 in any one calendar year.
- 22. The second type, called aggregate stop-loss or excess loss insurance, paid all claims over an annual, pre-agreed upon, total amount of claims paid by the School Corporation.
- 23. In some calendar years, the aggregate stop-loss or excess loss insurance began paying all claims after the self-insured plan paid 115% of expected claims. In other years, the coverage began at 125% of expected claims. The particular percentage at which the stop-loss insurance began paying was referred to as the attachment point.
- 24. The difference between expected claims and the excess loss attachment point is referred to as the "gap."
- 25. The School Corporation's stop-loss insurance policy provided that the School Corporation would prepay all losses which were covered under the School Corporation's stop-loss insurance policy. Later, the reinsurance carrier would reimburse the School Corporation for those prepayments of claims in excess of the deductible amount in the stop-loss insurance coverage.
- 26. The cost of the stop-loss insurance was paid from the trust account of the self-insured plan rather than from the general fund.

¹Occasionally, small amounts were returned to participants whose payments of premiums exceeded the amount owed.

- 27. The Association believed that the purpose of the stop-loss insurance was to safeguard and protect the plan and its reserves. The Association believed that the reinsurance reimbursements were deposited in the trust account.
- 28. Under this self-insured plan, the School Corporation was the "insurer" or "carrier" and bore the risk of loss.
- 29. Each collective bargaining agreement negotiated between the parties from at least 1995 through 1999 contained a provision under which the School Corporation and individual teachers in the bargaining unit, who chose to participate in the self-insured plan, shared the cost of the self-insured plan.
- 30. The parties had collective bargaining agreements for the following years: 1995-97, 1997-99, and 1999-2001.
- 31. Section A of Article XVI of the 1995-97 and 1997-99 Collective Bargaining Agreements reads as follows:

Section A of Article XVI²

²The remainder of Article XVI of the 1995-97 and 1997-99 Collective Bargaining Agreements also provided as follows:

A. HEALTH AND DENTAL

* * *

- 4. Teachers not desiring to enroll in either the single or family medical insurance plan shall be allowed to apply an amount equal to eighty percent (80%) of the Board's contribution for a single medical plan toward an optional benefit program as adopted by the GEA and the Board of Education. Once established, the amount of this optional benefit shall not increase during the school year.
- 5. Married couples both teaching in the Goshen Schools shall receive a fully paid Health and Dental Insurance Plan, less \$1. In addition, one spouse shall be allowed to apply an amount equal to fifty percent (50%) of the Board's contribution for a single medical plan toward an optional benefit program as adopted by the GEA and the Board of Education. Once established, the amount of this optional benefit shall not increase during the school year.
- 6. The Board shall pay for teachers on less than a full time contract on the same % as the contract.
- 7. The Board will continue payment of its portion of health insurance premiums as required by the Family and Medical Leave Act of 1993.

* * *

A. HEALTH AND DENTAL

- 1. The present policy benefits including:
 - a. medical coverage maximum of one million dollars.
 - b. pregnancy treated as illness.
 - c. co-insurance.
 - d. Major medical deductible of \$100.00 per person with a maximum of two (2) per family.
 - e. no deductibles for dental oral exams, x-rays, fluoride treatments or cleaning.
 - f. dental shall have a \$1,000.00 maximum per year.
- 2. The Board shall pay up to \$2000 for single coverage for the [1995-97 or 1997-99]³ school years. The teacher will pay the balance of the cost, if any, but at least \$1.
- 3. The Board shall pay up to \$4650 for family coverage for the [1995-97 or 1997-99] school years. The teacher will pay the balance of the cost, if any, but at least \$1.
- 32. On the other hand, the language of Section A of Article XVI in the 1999-01 Collective Bargaining Agreement differed from that of the previous years. The provision reads as follows:

Section A of Article XVI

A. HEALTH AND DENTAL 4

E. EVALUATION OF INSURANCE

The Goshen Community Schools is committed to obtaining the optimum benefits for its insurance premiums, and to that end will:

- 1. Evaluate its insurance program on an annual basis.
- 2. All carriers and programs shall be adopted by mutual agreement of parties.
- 3. Establish a program of education in an attempt to help participants more efficiently use their insurance benefits.

³The term of the contract was the only language in Article XVI of the 1995-97 Collective Bargaining Agreement that differed from the language in Article XVI of the 1997-99 Collective Bargaining Agreement. The dollar amounts in the two collective bargaining agreements were the same.

⁴The remainder of Section A of Article XVI in the 1999-01 Collective Bargaining Agreement also differed and provided as follows:

A. HEALTH AND DENTAL

- 1. The present policy benefits including:
 - a. medical coverage maximum of one million dollars.
 - b. pregnancy treated as illness.
 - c. co-insurance.
 - d. Major medical deductible of \$100.00 per person with a maximum of two (2) per family.
 - e. no deductibles for dental oral exams, x-rays, fluoride treatments or cleaning.
 - f. dental shall have a \$1,000.00 maximum per year.
- 2. The Board shall pay up to \$2,400 for single coverage for the 2000 calendar year (January 1, 2000 and continuing through December 31,

* * *

- 4. Teachers not desiring to enroll in either the single or family medical insurance plan shall be allowed to apply an amount equal to eighty percent (80%) of the Board's contribution for a single medical plan toward an optional benefit program as adopted by the GEA and the Board of Education. Once established, the amount of this optional benefit shall not increase during the school year. Teachers enrolled (or requesting to be enrolled) in this optional benefit program during the 1999-2000 school year shall continue receiving this optional benefit. For all other teachers this optional benefit will not continue to be offered after the 1999-2000 school year.
- 5. Married couples both teaching in the Goshen Schools shall receive a fully paid Health and Dental Insurance Plan, less \$1. In addition, one spouse shall be allowed to apply an amount equal to fifty percent (50%) of the Board's contribution for a single medical plan toward an optional benefit program as adopted by the GEA and the Board of Education. Once established, the amount of this optional benefit shall not increase during the school year. Teachers enrolled (or requesting to be enrolled) in this optional benefit program during the 1999-2000 school year shall continue receiving this optional benefit. For all other married teachers this optional benefit will not continue to be offered after the 1999-2000 school year.

* * *

7. The Board will continue payment of its portion of health insurance premiums as required by the Family and Medical Leave Act of 1993 (currently three [3] months). The three month period will begin with the first leave date, paid or unpaid.

- 2000). Effective January 1, 2001 the Board will pay up to \$2,400 plus 65% of any rate increase for the 2001 calendar year (January 1, 2001 and continuing through December 31, 2001). The teacher will pay the balance of the cost, if any, but at least \$1.
- 3. The Board shall pay up to \$5,600 for family coverage for the 2000 calendar year (January 1, 2000 and continuing through December 31, 2000). Effective January 1, 2001 the Board will pay up to \$5,600 plus 65% of any rate increase for the 2001 calendar year (January 1, 2001 and continuing through December 31, 2001). The teacher will pay the balance of the cost, if any, but at least \$1.
- 33. Prior to the 1999-01 contract, both parties understood this contract language to mean that the School Corporation would support the self-insured plan except to the extent that the amount of premiums established for the respective year exceeded the dollar amounts in the corresponding collective bargaining agreement. The teachers would pay the amount of premium established for the respective year which exceeded the dollar amounts in the corresponding collective bargaining agreement. In all instances, the teachers would pay at least \$1.00.

The language was never taken to mean that teachers would actually be required to pay their own medical or hospital bills at any point, other than through the standard deductibles, coinsurances, and exclusions. Premiums paid by the School Corporation and teachers were expected to pay anticipated claims; but obviously, there could be years in which actual claims exceeded anticipated claims, sometimes substantially.

- 34. When actual claims exceeded anticipated claims (and thus the total amount of premium to be contributed) in any given year, the School Corporation paid the difference between expected claims and the amount set as the attachment point⁵ for the aggregate excess loss insurance. In other words, the School Corporation as self-insurer bore the risk of loss in the "gap" between anticipated claims and that attachment point.
- 35. Section A of Article XVI of these three collective bargaining agreements makes reference to the School Corporation's "present policy." The School Corporation's "present policy" to which reference was made in the 1995-97 and 1997-99 collective bargaining agreements was composed of the Plan Document and Summary Plan Description for Goshen Community Schools, Amendments thereto, the Employee Benefits Fund Management Agreement, the Pyramid Benefit Services Claims Administration Agreement as renewed by Renewal Amendments thereto and the School Corporation's health and dental group excess loss insurance policy issued by Security Life of Denver Insurance Company, Group Policy Number G-46085.
- 36. The Plan Document and Summary Plan Description states with respect to funding:

⁵For example, 115% or 125% of the expected claims.

Cost of the Plan

Goshen Community Schools shares the cost of Employee and Dependent coverage under this Plan with the covered Employee. The enrollment application for coverage will include a payroll deduction authorization. This authorization must be filled out, signed and returned with the enrollment application.

The level of any Employee contributions is set by the Plan Administrator. The Plan Administrator reserves the right to change the level of Employee contributions.

at page 5, and

The cost of the Plan is funded as follows:

For Employee and Dependent Coverage: Funding is derived from the funds of the Employer and contributions made by the covered Employees.

The level of any Employee contributions will be set by the Plan Administrator. These Employee contributions will be used in funding the cost of the Plan as soon as practicable after they have been received from the Employee or withheld from the Employee's pay through payroll deduction.

at page 52.

37. The provisions in Article XVI which are set forth in Findings and Conclusions of Fact Numbers 31 and 32 (and the footnotes thereto) are the only provisions in the three collective bargaining agreements relating to teacher health insurance benefits. All three of those collective bargaining agreements contain an integration clause, Article XIX, which reads as follows:

XIX. ENTIRE AGREEMENT

Both parties agree that this contract sets forth the terms and conditions to which each party agrees to be bound and includes the entire agreement between the parties, replacing and canceling all previous oral and written agreements.

There were no amendments to the 1995-97 Collective Bargaining Agreement. There were no amendments to the 1997-99 Collective Bargaining Agreement other than a memorandum of understanding regarding early retirement. There have been no amendments to the 1999-2001 Collective Bargaining Agreement.

38. Article IV of both the 1995-97 and the 1997-99 collective bargaining agreements, entitled "MANAGEMENT RIGHTS," incorporates all the rights as enumerated in the General School Powers Act of 1965, as amended. Additionally, that contract article incorporates all of the responsibilities and authority set forth in Section 6(b) of the Act.

- 39. Article XVII in the 1995-97, 1997-99, and 1999-2001 collective bargaining agreements sets forth a grievance procedure which culminates with advisory arbitration.
- 40. On or before January 1, 1985, the School Corporation and the Association established an Insurance Committee for the purpose of reviewing and making recommendations regarding group insurance coverages.
- 41. The Insurance Committee meetings were conducted in a *pro forma* manner. The superintendent, the deputy superintendent, and the insurance broker, Stan Burt, represented the School Corporation. The Association was represented by Tom Holtzinger and Don Bokhart and perhaps another member or two. Holtzinger and Bokhart were also members of the Association's bargaining team at all relevant times.
- 42. In the fall of each school year, the Insurance Committee met to determine whether to continue the self-insured plan in the upcoming calendar year. At each of these annual meetings, the deputy superintendent reported on the status of the self-insured plan.
- 43. Then, Burt would explain what the amount (or cost) of the premium would be for the following year. That premium constituted the estimated total cost of the teacher health insurance coverage under the self-insured plan for the following calendar year. The amount of the premium was always composed of the three following cost components: (1) the estimated cost of the anticipated claims, (2) the cost of both specific and aggregate stop-loss insurance, and (3) certain other fees and expenses, such as the cost of the third-party administrator, bank fees, and insurance brokerage fees.
- 44. After Burt explained the respective costs for the upcoming year, the Association members would decide whether they wanted to keep the same coverage for another year, with the amount (or cost) of the premium being Burt's new calculation. In all relevant years, except 2000 and 2001, the Association chose to continue the self-insured health plan.
- 45. After the Association decided to keep the self-insured plan, the parties then in negotiations bargained specific dollar amounts that the School Corporation would pay for single plans and for family plans. When the negotiations concluded, any teacher could determine the cost of his or her health insurance by simply subtracting the above-described specific amount, which the School Corporation would pay, from the premium. For example, if the premium for a single plan was \$1950 and if the School Corporation agreed to pay \$2000 for a single plan, a single teacher would pay only the obligatory one dollar. Similarly, if the premium for a family plan was \$5000 and if the School Corporation agreed to pay \$4000 for a family plan, a teacher with a family plan would pay \$1000.
- 46. Although the teachers on the Insurance Committee met annually to learn the estimated cost of the self-insured plan, the teachers and the Association played no other part in the design, operation, or administration of the self-insured plan.
- 47. The Association was not advised monthly or semi-annually as to plan balances, claim levels,

or other such details.

48. From the evidence, it can be inferred that the teachers *thought* that both the teachers and the School Corporation were *obligated to pay their respective shares of the premium* into the self-insured plan in each calendar year.⁶

They knew that biweekly deductions were made from the teachers' paychecks to pay the teachers' share of the premium. They would have known that the relevant portion of the health insurance policy provided that the amounts withheld from the teachers' paychecks were to be deposited immediately into the plan. Thus, they reasoned that, since the teachers were making periodic payments, the School Corporation was also doing so. They did not know whether the School Corporation was making biweekly or monthly payments.

- 49. In 1997, the School Corporation paid in accord with the parties' prevailing Collective Bargaining Agreement all of the costs for full-time teachers' health insurance coverage except for the obligatory \$1.00. In 1998, the School Corporation paid all but \$1.00 of the costs for full-time teachers' single health insurance coverage and all but about \$48.84 of the costs for family health insurance coverage.
- 50. In 1999, the School Corporation paid all but \$381.64 of the costs for single health insurance coverage and all but about \$1466.40 of the costs for family health insurance coverage.

⁶The following exchange occurred between Association-witness Don Bokhart and the Association's counsel:

Q If that insurance company was called upon to make a payment under the stop-loss protection, where did you think the money from that insurance company would go?

A I thought it went into the trust account.

Q Did you have an understanding as to how the school district was paying its part of the cost of the health plan?

A No. I just assumed that the money went into the, that the deposits were made into the trust account.

Q Had anybody, until this dispute arose, ever told you anything to the contrary?

A No.

Q Until this dispute arose, did you ever learn that the school district had done anything with the reinsurance money or the excess money, other than put it in the trust account?

A No.

Q And then you say that you believe the intention was to build a reserve; is that correct?

A Correct.

- 51. Before April of 1999, the contributions made by the teachers and the contributions made by the School Corporation from the general and other funds were transferred into the School Corporation's self-insurance fund. The practice changed in April of 1999; in that month and thereafter in 1999, the School Corporation's contributions of premiums were deposited directly into the School Corporation's trust account.
- 52. Before April of 1999, the School Corporation would pay for anticipated costs of the self-insured plan by transferring premium from the self-insurance fund to the trust account.
- 53. The School Corporation would pay for unanticipated costs of the self-insured plan by transferring from the self-insurance fund to the trust account such monies as might be required from time to time to pay claims which in the aggregate exceeded the aggregate amount of claims anticipated when the levels of premium were set, but which did not in the aggregate exceed the aggregate deductible of the excess loss insurance.
- 54. The School Corporation would also have to "pay" a second category of unanticipated claims. In any year in which the aggregate claims exceed the deductible of the excess loss insurance, the School Corporation would have to pre-pay such a catastrophic loss. Later, the reinsurance carrier would reimburse the School Corporation. In any such instance, the School Corporation would have to actually pay the costs associated with the gap. Such costs are described in the preceding finding.
- 55. In May, 1997, the School Corporation received a reinsurance reimbursement in the amount of \$424,583.29. The School Corporation deposited that reimbursement in the self-insurance fund.
- 56. In 1997, the School Corporation failed to make its monthly premium payments in July, August, and November.
- 57. The School Corporation used reinsurance reimbursements to make those three 1997 monthly premium payments.
- 58. The failure to make those three premium payments in 1997 did not occur because of low claims in that particular year. Actual claims for 1997 exceeded the funds placed in the trust account by approximately \$500,000.
- 59. At the time the School Corporation utilized reinsurance reimbursement proceeds to make the School Corporation's routine monthly premium payments in July, August, and November, 1997, the Association was unaware that the School Corporation had deviated from the previous practice of making monthly premium payments only from the general fund into the self-insurance fund.⁷ The

⁷Prior to April, 1999, the School Corporation occasionally made such premium payments directly from the general fund into the trust account. In April, 1999, and subsequent thereto, the School Corporation made all premium payments from the general fund directly into the trust account.

Association did not become fully aware of that deviation until told by Indiana State Teachers Association consultants and by the School Corporation's insurance consultant, Dennis Maggart, in 1999.

- 60. In 1997, the School Corporation failed to make its November and December monthly transfers of premiums from the self-insurance fund to the trust account.
- 61. Claims in 1998 significantly exceeded the projected claims. There were inadequate funds in the trust account to pay the claims. Because of the high claims, the School Corporation paid more than the expected premium in 1998. The School Corporation made those excess payments not because the School Corporation had missed payments in 1997 but rather because of the high claims in 1998.
- 62. Premium payments from the general fund to the self-insurance fund or to the trust account were generally made monthly. Transfers of premiums from the self-insurance fund to the trust account also were generally made monthly.
- 63. However, the School Corporation failed to make several monthly premium payments in years other than 1997. Specifically, the School Corporation failed to make the following additional monthly premium payments: (1) two monthly premium payments in 1991; (2) one monthly premium payment in 1992; and (3) two monthly premium payments in 1994. The Association was unaware until recently that the School Corporation failed to make those monthly premium payments. No evidence was introduced to show the effect of the non-payment of those five monthly premium payments.
- 64. The School Corporation *did not use* reinsurance reimbursements to finance those five monthly premium payments.
- 65. Similarly, the School Corporation failed to make some of its monthly transfers of monies from the self-insurance fund to the trust account. Specifically, the School Corporation did not make the following transfers: (1) a November transfer in 1991; (2) a December transfer in 1992; (3) November and December transfers in 1994; and (4) November and December transfers in 1997. Otherwise, the School Corporation made monthly transfers from the self-insurance fund to the trust account in each calendar year from 1991 to and including 1997. The School Corporation's failure to make those above-described transfer payments will have no effect on the outcome of this case.
- 66. At the September 21, 1999, negotiations meeting, the Association made an attempt to introduce the issue regarding the usage of the May, 1997, reinsurance reimbursement proceeds. Specifically, the Association wished to discuss the fact that the School Corporation made premium payments from those reinsurance reimbursement proceeds in July, August, and November, 1997, rather than making such payments from the general fund. Holtzinger made the Association's presentation in which he asked the School Corporation to develop a plan which would, over five or ten years, address the School Corporation's failure to make those three 1997 monthly premium payments from the general fund.

- Dr. Duell, an assistant superintendent, abruptly admonished Holtzinger that only the Association's spokesperson -- UniServ Director Kent Kimpel -- was authorized to articulate Association proposals. There was no follow-up to Holtzinger's presentation. The School Corporation's failure to make those three 1997 monthly premium payments from the general fund was never brought up again in the 1999-2001 negotiations. Similarly, the appropriate usage of reinsurance reimbursements was also never discussed again.
- 67. On June 10, 1999, Kimpel informed the Association that he believed the parties would have to deal with this dispute through "bargaining" and "advocacy." In view of the September 21, 1999, negotiations meeting, Kimpel advised the Association on September 27, 1999, that this dispute could best be resolved by filing an unfair practice claim. The Association's executive committee voted 12-0, with one abstention, later that day to file this Complaint for Unfair Practice.
- 68. The totals of all contributions required from all sources for each of the years 1996, 1997, 1998 and 1999 -- the total annual premium required in each of those plan years -- were:

1996	2,026,988.57
1997	2,240,402.68
1998	2,341,047.07
1999	2,990,532.49

The actual costs of the health and dental benefits plan -- as measured by disbursements from the trust account (cash basis accounting), not by claims and other liabilities incurred each year (accrual basis accounting) -- were:

1996	2,227,999.67
1997	2,360,573.98
1998	3,166,243.02
1999	$3,120,305.48^8$

The resultant cost overruns were:

1996	201,011.10
1997	120,171.30
1998	825,195.95
1999	129,772.99

69. The School Corporation received reimbursements under its group excess loss insurance

⁸This figure includes \$14,000 paid out of the self-insurance fund to Dennis Maggart, insurance consultant.

policy as follows:

During Calendar Year	Amount for Excess <u>Aggregate Losses</u>	Amount for Excess Specific Losses
1997	439,828.20	101,234.54
1998	2,000.00	276,435.71
1999	-0-	127,035.24

Except for a reimbursement of \$4,602.48 in 1997 for excess specific losses, all of these reimbursements were deposited into the School Corporation's self-insurance fund.

70. In 1997, the total of all funds committed to support of the School Corporation's self-insured plan was \$2,763,248.59, calculated as follows:

Health insurance trust account,	
beginning balance	636,677.93
Self-insurance fund,	
beginning balance	12,594.51
Deposits into the self-insurance fund	2,090,029.35
Interest paid on the health	
insurance trust account	26,651.75
Refunds of overpayment of	
premium by participants	(2,704.95)
_	2,763,248.59

71. In 1998, the total of all funds committed to support the School Corporation's self-insured plan was \$3,185,529.77, calculated as follows:

Health insurance trust account,			
beginning balance	154,264.68		
Self-insurance fund,			
beginning balance	245,883.49		
Deposits into the self-insurance fund	1,822,781.68		
Deposits into the health insurance trust			
account from sources other than			
the self-insurance fund	955,847.50		
Interest paid on the health			
insurance trust account	7,328.71		
Refunds of overpayment of			
premium by participants	(576.38)		
	3,185,529.77		

72. In 1999, the total of all funds committed to support the School Corporation's self-insured

plan was \$3,347,914.87, calculated as follows:

Health insurance trust account,	
beginning balance	14,483.82
Self-insurance fund,	
beginning balance	12,338.02
Deposits into the self-insurance fund	1,717,856.95
Deposits into the health insurance trust	
account from sources other than	
the self-insurance fund	1,597,265.53
Interest paid on the health	
insurance trust account	6,581.18
Refunds of overpayment of	
premium by participants	(610.63)
	3,347,914.87

- 73. Stahly tried to reconstruct the School Corporation's documents for the years 1991 through 1999. In particular, Stahly attempted to compute the difference between the amount of the premiums the School Corporation paid into the self-insurance fund in 1997 and the amount of the premiums the School Corporation should have paid into the self-insurance fund in 1997 if the School Corporation had made all twelve of its monthly premium payments. Stahly's calculations show that the School Corporation's premium payments in 1997 were at least \$386,000 less than they should have been if the School Corporation had made all twelve of its 1997 monthly premium payments.
- 74. This matter did not become a subject of dispute until the claims experience of 1998 necessitated an increase in premium for 1999.
- 75. On December 3, 1998, the School Corporation notified the teachers by memorandum that the self-insured plan premium would have a 30% increase in 1999. That memorandum described two alternative, less expensive plans with correspondingly less coverage.
- 76. After evaluating their options, the teachers decided to continue the self-insured plan in 1999 and to pay the 30% premium increase.
- 77. On January 18, 1999, the Association requested information from the School Corporation regarding the self-insured plan. The requested information was provided. The School Corporation and Association then engaged in discussions.
- 78. In these discussions, the School Corporation took the position that "the reinsurance reimbursements were in fact reimbursements of amounts *spent* by the School Corporation to pay benefits under the School Corporation's self-insured plan and could be *utilized* by the School

Corporation for any purpose." (emphasis added)

- 79. The Association took the position in these discussions that these reimbursements should have been deposited directly into the trust account where they would have built up a reserve which, in view of the Association, would have had a significant impact on the premium amounts required in 1999.
- 80. During the negotiations in the fall of 1999 regarding health insurance, the parties talked/bargained about the School Corporation paying \$2000 on the single plan in 2000 and \$2000 (plus 65% of any increase in the single plan in 2001). In regard to the family plan, the parties talked/bargained about \$5500 in 2000 and \$5500 (plus 65% of any increase in the family plan in 2001).

Two thousand dollars on the single plan represented an increase of zero dollars from the previous year. Five thousand five hundred dollars represented a \$850 increase on the family plan from the previous year.

Although the parties' dispute over reinsurance reimbursements was briefly mentioned only once during the actual negotiations, the School Corporation argues that the negotiations, at least in part, were undertaken in an effort to settle this dispute. The School Corporation concedes that it never mentioned such an effort to settle the dispute to the Association.

The one time the Association brought the reinsurance reimbursements up during negotiations, the School Corporation rebuffed the Association. Settlement of this dispute never came up again in negotiations.

- 81. In December, 1999, during the latter part of the negotiations on the 1999-2001 Collective Bargaining Agreement, the School Corporation offered to pay more of the teachers' health insurance premium than the teachers had requested. Specifically, the School Corporation offered to pay an additional \$400 on the single plans and an additional \$100 on the family plans. The School Corporation had already offered to pay an additional \$850 on the family plans.
- 82. Several facts belie the School Corporation's assertion that the parties settled the dispute

⁹Note that once the self-insured plan becomes completely insolvent, as this plan did in 1999, any prepayment of a catastrophic loss must be paid with funds which originate from the general fund. In such an instance, the reinsurance reimbursement could be utilized by the School Corporation for any purpose. However, that is not what happened here.

In this case, in 1996, the School Corporation used the premium payments that were in the self-insured plan to prepay the catastrophic loss. Then, when the reinsurance reimbursement was made the School Corporation wanted to treat the reimbursement not as a return of funds from the self-insured plan but rather as funds which originated from the general fund (and could be used for any purpose). *See* Discussion, *infra*, on pages 22 through 26.

herein during the 1999-01 negotiations on the collective bargaining agreement. First, the Association was/is seeking a remedy of approximately \$450,000. The School Corporation's gratuitous additional contribution to the teachers' health insurance premium was only \$400 per single plan and \$100 per family plan. Second, the Association attempted to address the reinsurance receivables dispute on September 21, 1999, at the bargaining table, and were harshly rebuffed by a School Corporation administrator. After rebuffing the Association, the School Corporation declined to initiate express negotiations on the issue of the 1997 reinsurance receivables.

83. Additionally, both parties had legitimate collective bargaining reasons for agreeing to the additional School Corporation contribution to the teachers' health insurance premium. The School Corporation did not pay as large a percentage of the non-certificated employees' health insurance premium as it did of the teachers' health insurance premium. Thus, the School Corporation wished to give the non-certificated employees an additional \$400 on the single plan. The School Corporation simply decided to give the teachers the same additional dollars on health insurance.

Furthermore, the School Corporation was hoping the additional dollars for health insurance would effect two other distinct outcomes. First, the School Corporation was hoping (as contrasted to forthrightly asking the Association) that the additional School Corporation contribution to the teachers would mollify the Association and that the Association would not file an unfair practice complaint. Second, the School Corporation believed its offer of additional dollars on insurance would assure Association settlement and ratification of the entire 1999-2001 collective bargaining agreement (as contrasted to settlement of the Association's unfair practice claim).

- 84. Finally, when the School Corporation made its offer to contribute additional dollars toward the health insurance premium, the Association was still trying to obtain a little higher salary raise. The Association perceived the School Corporation's gratuitous offer as an attempt to provide the teachers additional dollars simply to settle the collective bargaining agreement. The Association did not consider the School Corporation's gratuitous offer to be a bona fide offer to compromise and resolve the parties' dispute over the School Corporation's usage of reinsurance receivables in 1997.
- 85. The evidence does not support the School Corporation's assertion that the parties' dispute over the usage of reinsurance reimbursements in 1997 was on the bargaining table in November and December, 1999, when the intensive bargaining on financial issues occurred.
- 86. At no time did the School Corporation ever expressly ask the Association to resolve the dispute over the 1997 reinsurance receivables as a part of the parties' settlement of the 1999-2001 collective bargaining agreement.
- 87. Beginning January 1, 2000, the self-insured plan was closed. The School Corporation now purchases health insurance from the ISTA Insurance Trust.
- 88. At the end of the last plan year of a self-insured plan, there were claims outstanding which were incurred during the period of self-insurance but which had not yet been recorded or, if recorded, not yet paid.

- 89. This is referred to as the IBNR or incurred but not reported claims. It is also known as the "run-out."
- 90. When the School Corporation closed its self-insured plan at the end of 1999, there was an estimated \$634,897 in IBNR, or run-out, claims which had to be paid. The actual amount of IBNR at the end of 2000 was \$423,249.31. The School Corporation's health insurance trust account paid dental IBNR, and then the balance in the trust account, \$157,880.95, was transferred from the trust account to the ISTA Insurance Trust to be applied against medical IBNR, thereby reducing the total of medical IBNR to be financed from the estimated \$634,897 to \$265,368.36.
- 91. As part of a multi-year insurance program, the ISTA Insurance Trust financed payment of this run-out by imposing a surcharge in addition to the premium.

ISSUE

Did the School Corporation, by making a unilateral change in how the reinsurance reimbursements were used in 1997, violate the Act and thereby commit a refusal to bargain unfair practice?

DISCUSSION

I.

Here, the Association alleges that the School Corporation engaged in an unfair practice by unilaterally changing a subject of mandatory bargaining. Specifically, the Association alleges that the School Corporation changed its past practice by using reinsurance reimbursements to make the School Corporation's monthly premium payments. Reinsurance is a component of a self-insured health plan, which is a fringe benefit. Therefore, the Association concludes that the School Corporation made a unilateral change in a mandatory subject of bargaining, and, in doing so, committed an unfair practice under Section 4 of the Act.

The School Corporation denies the Association's allegation by maintaining that the evidence shows the School Corporation fulfilled its contractual duty by committing funds each relevant year to the self-insured plan which were in excess of the respective calculated costs of the plan. The School Corporation further maintains that it had no contractual obligation to make monthly premium payments. Finally, the School Corporation reasons that several affirmative defenses apply in this case.

Now the applicable law must be reviewed. Section 4 of the Act enumerates items that the parties must bargain. Specifically, Section 4 states:

A school employer shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage

related fringe benefits.

Health insurance is an obvious salary and wage related fringe benefit within our Nation's socio-economic scheme. However, IEERB has also held other less obvious items to be salary and wage related fringe benefits. For example, in *MSD of Washington Township*, U-87-10-5370, 1987 IEERB Ann. Rep. 89, 93 (1987), Board *aff'd in pertinent part*, 1988 IEERB Ann. Rep. 72, 75 (1988), the Board held that a school corporation-sponsored "wellness program" was a salary and wage related fringe benefit that must be bargained with the teachers. Additionally, in *Kankakee Valley School Corporation*, U-83-5-3785, 1983 IEERB Ann. Rep. 135, 142 (1983), Board *aff'd in pertinent part*, 1984 IEERB Ann. Rep. 93, 100 (1984), the Board held maternity leave and sick leave to be salary and wage related fringe benefits.

Similarly, the concept of unilateral change has been a part of the IEERB case law for many years. Examination of an IEERB case with a rather simple factual situation will illustrate the concept of unilateral change. In *MSD of Warren Township*, U-92-51-5360, 1995 IEERB Ann. Rep. 242 (1995), Board *aff'd in pertinent part*, 1995 IEERB Ann. Rep. 246 (1995), the school corporation changed its long-term disability insurance carrier¹⁰ and simultaneously reduced the teachers' disability benefits. The hearing examiner held that the reduction in benefits was a unilateral change in a mandatory subject of bargaining and that such a change constituted a refusal to bargain unfair practice. 1995 IEERB Ann. Rep. at 244. The Board affirmed the hearing examiner's holding on the issue of reduced benefits. 1995 IEERB Ann. Rep. at 247. *See also South Dearborn School Corporation*, U-90-20-1600, 1991 IEERB Ann. Rep. 240, 243 (1991); *Fayette County School Corporation*, U-82-15-2395, 1982 IEERB Ann. Rep. 398, 403 (1982).

В.

Although the *Warren Township* case clearly demonstrates how a unilateral change occurs within a factual situation, two additional aspects of some unilateral changes must be explored before that legal concept can be appropriately applied herein. First, although the school corporation intentionally committed the unilateral change in the teachers' disability benefits in the *Warren Township* case, it is not necessary for the alleged wrongdoer to have intended to commit a unilateral change unfair practice. In *Board of School Trustees of the Mississinewa Community Schools*, U-74-4-2855, 1974-75 IEERB Ann. Rep. 456 (1975), the school corporation unwittingly made unilateral changes in several handbook items which previously had been agreed upon by the parties. The hearing examiner held that such unilateral school corporation action "conclusively manifests a lack of good faith by that employer in bargaining." The hearing examiner further observed that the duty

¹⁰The hearing examiner also held that the teachers' organization had no statutory right to bargain the carrier in the absence of a unilateral change in the benefits. The Board did not adopt that holding. Instead, the Board found that the hearing examiner's holding in regard to the change in the teachers' benefits addressed and resolved the only issue presented by the facts. Therefore, the Board declined to decide whether a change in the carrier without a corresponding change in the benefits was an unfair practice because any such holding would have been dicta.

to bargain may be violated in a situation wherein the alleged wrongdoer acted "subjectively in good faith," stating:

We hold that an employer's unilateral change in conditions of employment under negotiations is similarly a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objective of Section 8(a)(5) as much as does a flat refusal.

Id. at 461.

Thus, in the present case, it is of no import that the School Corporation did not intend to misappropriate reinsurance reimbursement proceeds. Under *Mississinewa*, the School Corporation could still have violated the Act even though it had no intention of doing so.

Second, in many instances involving a unilateral change by a school corporation, the change involves a breach of some contractual agreement between the parties. For example, in *Warren Township*, the school corporation had a contractual duty to continue providing the same disability benefits to the teachers. There, the school corporation's unilateral change also constituted a breach of contract.

In the present case, however, the School Corporation had no contractual duty to refrain from making the alleged unilateral change -- that is, using the reinsurance reimbursement proceeds to make routine monthly premium payments from which ordinary claims were paid. Instead, in this instance, the School Corporation made a unilateral change in a previous course of conduct (or in a past practice). In all prior years the School Corporation had used the reinsurance reimbursement proceeds to pay catastrophic losses: that is, losses which were in excess of the deductible of the stop-loss insurance. Based on the prior conduct of the School Corporation, the teachers had a reasonable expectation that the School Corporation would continue in 1997 to pay such losses from the reinsurance reimbursement proceeds rather than using the reinsurance proceeds to make routine monthly premium payments from which ordinary claims were paid. Thus, herein the duty on the School Corporation to continue using reinsurance reimbursements as it had in the past arose not from a contract but from the past practice of the parties.

The IEERB case law concerning past practice is somewhat limited. The legal concept was articulated in *Union County School Corporation*, 1981 IEERB Ann. Rep. 392 (1981), *rev'd on other grounds* at 471 N.E.2d 1191 (Ind. Ct. App. 1984). In *Union County*, in 1976-77 the school corporation was closed for 18 days due to inclement weather. The school corporation paid the teachers for those missed days. Since the school corporation later required the teachers to make up three of those days, it issued supplemental contracts to pay the teachers extra for those three days.

¹¹See also Mount Pleasant Township Community School Corporation, U-98-02-1910, 2000 IEERB Ann. Rep. 34, 66-67 (2000), Board *aff* d, 2000 IEERB Ann. Rep. 85 (2000).

In 1977-78, the school was closed for 19 days due to inclement weather. That year the school corporation required the teachers to make up seven days for which they did not receive extra compensation. The IEERB held that based on the theory of past practice that the school corporation could not change its position on extra pay in 1977-78 without bargaining the issue with the teachers. In explaining the significance of the theory of past practice, the hearing examiner stated:

Past practices are important in that they represent the agreed upon solution to a problem arranged between the employer and the employees. A past practice need not, to be binding upon the parties, be reduced to writing. An employer or exclusive representative ignores past practices at their peril, putting at risk the relationship, or trust, of the parties. Unfortunately, in this instance, the employer simply made unilateral changes without bargaining the wages, or make-up schedule, with the exclusive representative.

Union County, 1981 IEERB Ann. Rep. at 397, Board *aff'd*, 1982 IEERB Ann. Rep. 518 (1982), rev'd on other grounds at 471 N.E.2d 1191, 1196-1197.

The Indiana Court of Appeals first recognized and applied the legal concept of past practice under the Act in *Union County School Corporation v. Indiana Education Employment Relations Board*, 471 N.E.2d 1191, 1198-1199 (Ind. Ct. App. 1984). Therein, the school corporation was closed for a number of days in both 1976-77 and 1977-78 due to inclement weather. In 1976-77, the school corporation gave the teachers extra pay for three make-up days. In 1977-78, the school corporation refused to give the teachers extra pay for the seven make-up days. The school corporation did not bargain or "discuss" the make-up days with the exclusive teachers' organization in 1977-78. The exclusive teachers' organization and the IEERB took the position that the school corporation had violated the past practice in regard to bargaining and "discussing" the make-up days and the school calendar.

The Court in *Union County* rejected the past practice argument in regard to the issue of bargaining extra pay and the school calendar. The Court found that those two items were managerial prerogatives which the school corporation could not delegate to the bargaining process. Conversely, the Court held that the concept of past practice was applicable to the potential "discussion" violation by the school corporation. The Court based its analysis of the "discussion" issue on the concept of past practice and the inferences which may be drawn in an instance wherein one party disengages from the parties' past practice and thereby injures the other party, who continued the past practice based on the reasonable belief that both parties would continue it. Here, the Court observed that since the school corporation paid the teachers extra for the make-up days in 1976-77, it was reasonable for the teachers to assume that they would be paid extra for make-up days in 1977-78. As a result of having justifiably relied on that 1976-77 past practice regarding extra pay, the teachers had no reason to seek "discussion" about that same subject in 1977-78. The Court conversely observed that the school corporation was aware that it did not intend to pay the teachers in 1977-78 for make-up days.

Confronted with those facts, the Court concluded that since the teachers had no knowledge

of any impending change regarding extra pay for make-up days, timely "discussion" of such a change in the school corporation's extra-pay policy could have occurred only if the school corporation had initiated it. Therefore, the *Union County* Court held that the school corporation therein had failed (or "refused") to fulfill its statutory obligation to "discuss" those 1977-78 make-up days.

The *Union County* case illustrates how flexibly the concept of past practice may be applied to prevent an injustice from occurring in an instance wherein one party inappropriately discontinues a past practice to the detriment of the other party who in good faith believed the past practice would continue. As a result of that flexibility, the concept of past practice may be applied in many other factual situations to prevent similar injustices. For example, in the present case, the concept of past practice can be invoked to resolve the parties' dispute over the proper usage of reinsurance reimbursement proceeds.

C.

In the years prior to 1997, the School Corporation used reinsurance reimbursements to pay catastrophic losses (as contrasted to ordinary, anticipated claims). However, in 1997, the School Corporation used reinsurance reimbursements to make three of the School Corporation's monthly premium payments.

In an effort to better understand the dispute between the parties, consider the following hypothetical situation which demonstrates how the self-insured plan should have operated *in 1997*. For example, assume that the health plan in 1996 incurred catastrophic losses that exceeded the deductible of the aggregate stop-loss insurance. Further assume that those catastrophic losses equaled approximately \$425,000. In 1996 the trust account would have "pre-paid" the catastrophic-loss claimants (providers) an amount equal to \$425,000. Then, in 1997, the reinsurance carrier would have reimbursed the self-insured plan (that is, the School Corporation) in an amount equal to that of the pre-payment from the self-insured plan: \$425,000. The School Corporation would have deposited those reinsurance reimbursements in the self-insurance fund. Simultaneously the School Corporation in 1997 would have continued making average monthly premium payments of approximately \$150,000. Three such premium payments would add an additional \$450,000 to the self-insurance fund which could be used to pay claims in 1998 or 1999. The \$425,000 reinsurance reimbursements would remain in the self-insurance fund or the trust account to pre-pay future catastrophic losses.

However, that is not what happened here. In this case, the School Corporation in 1997 deposited the reinsurance reimbursements of approximately \$425,000 into the self-insurance fund. But in 1997 the School Corporation decided not to make three of the routine monthly premium payments from its general fund to the self-insurance fund. Instead, the School Corporation used the

reinsurance reimbursements (\$425,000) to make approximately three monthly premium payments. Those reinsurance reimbursements were then used to pay ordinary, anticipated claims rather than future catastrophic losses. The result was two-fold. First, the three premium payments -- \$450,000 - were not available in 1998 or 1999 to pay claims. Second, the School Corporation's general fund contained an additional \$450,000 that the School Corporation argues can be used for any purpose.

As noted above, it is an unfair practice to make a unilateral change in a mandatory subject of bargaining. Here, in 1996 and the years prior thereto, the School Corporation occasionally did not make all of its routine monthly premium payments from its general fund to the self-insurance fund.¹³ However, in those years the School Corporation *did not use* reinsurance reimbursements to make monthly premium payments which it failed to make from its general fund.

In 1997, the School Corporation made a unilateral change in the use of a component of the teachers' self-insured health plan: that is, the School Corporation changed how it used reinsurance reimbursements. The reinsurance reimbursements connected with that health plan are a bargainable fringe benefit. Thus, the School Corporation unilaterally changed a mandatory subject of bargaining.

In other words, in 1997, the School Corporation made a unilateral change in its past practice in regard to how it used reinsurance reimbursements. In 1996 and prior thereto, the School Corporation used reinsurance reimbursements only to supplement premium payments to the self-insurance fund (as contrasted to supplanting premium payments). In 1997, for the first time the School Corporation used reinsurance reimbursements to make three routine monthly premium payments, which it had failed to make from its general fund. In doing so, the School Corporation

Because these excess loss insurance reimbursements provided monies out of which the School Corporation's contributions of premium could be made, for certain periods of time it was not necessary for the School Corporation to make regular monthly contributions to the self-insurance fund out of the general fund (for members of the bargaining unit and others), the transportation fund, the Elkhart County Special Education Cooperative fund, or any other fund which pays employee compensation and benefit costs.

Joint Stipulation 75 reads as follows:

In these discussions, the school employer took the position that the excess loss insurance reimbursements were in fact reimbursements of amounts *spent* by the School Corporation to pay benefits under the School Corporation's self-insurance plan and could be *utilized* by the School Corporation *for any purpose*. (emphasis added)

See also the discussion concerning the fundamental mechanics of the self-insured plan in 1997 on pages 24 through 26.

¹²Joint Stipulation 65 reads as follows:

¹³Note that a few of those premium payments may have been made directly to the trust account.

made a unilateral change in a past practice involving a mandatory subject of bargaining. Such School Corporation conduct constituted a refusal to bargain unfair practice.

II.

A.

Finally, a common sense analysis of the most fundamental mechanics of the self-insured plan in 1997 must be made to determine if the outcome of our purely legal analysis is flawed. The *original source* and the *basic nature* of the monies in the self-insurance fund and in the trust account never change. Note, however, that the form of some of the assets in the self-insurance fund and trust account does change when a catastrophe loss occurs. In all instances, when a transfer is made to a catastrophic-loss claimant by the third-party administrator, the form of some of the specific assets changes from a cash deposit to an account receivable of equal value.

The original source of all monies in the self-insurance fund and the trust account was premium contributions made by the School Corporation and by the teachers.¹⁴ When the School Corporation transferred premium payments to the self-insurance fund those monies were no longer discretionary School Corporation funds. Instead, they were part of the teachers' compensation package; and, after their transfer to the self-insurance fund, they were monies being held for the benefit of the teachers' health plan (and not for the benefit of the School Corporation's general fund).

When a catastrophic loss occurs the third-party administrator is required to make a transfer from the trust account to the claimant in regard to the catastrophic loss. When that transfer occurs, the form of some of the earlier premium payments changes (from a cash deposit to an account receivable); but the transfer does not reduce the total amount of *assets* being held for the benefit of the teachers' health plan. In particular, such a transfer concerning a catastrophic loss does not convert assets being held for the benefit of the teachers' health plan into discretionary School Corporation monies.¹⁵

When a catastrophic loss occurs and funds are transferred ("prepaid") from the self-insurance trust account to claimants, such a transfer is not a true expenditure. If it were a true expenditure the

¹⁴For the sake of simplicity, interest earned on those premium payments is not addressed in this discussion. Note that all interest earned on those premium payments would inure to the benefit of the teachers' health plan because such interest was earned on monies that were being held for the benefit of the teachers' health plan. For the same reason assume that the gap was paid for with reserves that had carried over from the previous years.

¹⁵This analysis assumes that the self-insured plan was solvent and that prepayments of catastrophic losses were made solely from the self-insured plan itself rather than from funds transferred from the general fund to an insolvent self-insured plan for the specific purpose of prepaying a catastrophic loss.

assets being held for the benefit of the teachers' health plan (in the self-insurance fund and in the trust account) would be depleted in an amount equal to the transfer of cash to the claimant (provider). However, when such a transfer is made, the total amount of assets being held (in the self-insurance fund and the trust account) for the benefit of teachers' health plan does not change.

As was illustrated above, only the form of those assets changes. Some of those assets being held for the benefit of the teachers' health plan change from a cash deposit into an account receivable in the self-insurance fund of equal value. In other words, no such depletion of assets occurs. Simultaneously, the reinsurance carrier incurs an account payable in an amount equal to the account receivable in the self-insurance fund.

When such an account receivable is collected, the original source of the asset remains the same. The original source was a School Corporation premium payment in a prior year. Therefore, if those reinsurance reimbursements are used to make another premium payment from which ordinary claims will be paid, the School Corporation, in effect, is attempting to make two premium payments (one the past year and one in the present year) with the same money: that is, money whose original source was a premium payment in the prior year.

The underlying fact that the School Corporation is attempting to make two premium payments with only one-month's worth of money is a simple concept. The reason the true nature of the transaction (that is, a "prepayment" with a corresponding reinsurance reimbursement) eludes us from time to time is three-fold. First, the fact that money is fungible causes us to lose sight of the original source and nature of monies in the self-insurance fund and in the trust account. Second, the fact that we perhaps inappropriately refer the transfer of monies to a catastrophic-loss claimant as a pre-*payment* gives the false impression that the School Corporation actually *expended* discretionary School Corporation funds.

No such School Corporation expenditure occurred. The monies transferred in a pre-payment to a catastrophic-loss claimant were not a part of the School Corporation's general fund. Instead, those monies were a part of the teachers' health plan.

Third, the fact that the reinsurance reimbursements come back through the bank account of the School Corporation creates the illusion that those monies (whose original source was a premium payment in a prior year) somehow belong to the School Corporation instead of belonging to the teachers' health plan. In fact, those monies are accounts receivable that arose when cash in the teachers' health plan was transferred to a catastrophic-loss claimant.¹⁶

As demonstrated above, a common sense review of the fundamental operation of the self-

¹⁶Note that the School Corporation, through its own conduct, appears to acknowledge this fact. In the relevant years -- 1997, 1998, and 1999 -- the School Corporation deposited all reinsurance reimbursements into the self-insurance fund.

insured plan *in* 1997¹⁷ did not expose any fallacy in the outcome of our legal analysis. Therefore, it must ultimately be determined herein that the School Corporation made a unilateral change in a mandatory subject of bargaining and that, in doing so, the School Corporation committed a refusal to bargain unfair practice.

В.

In sum, after reviewing several options, the parties decided in December, 1999 to terminate the self-insured plan and obtain a fully insured health insurance plan. The new plan was through the ISTA Insurance Trust which was to finance a portion of the IBNR which was estimated to be \$634,897.00. Such financing was achieved by placing a surcharge on the premiums to pay claims.

Thus, in January, 2000, the teachers began paying higher premiums because there were insufficient funds in the trust account to pay outstanding claims. If the additional \$450,000 had been in the trust account, most of the anticipated IBNR could have been paid without placing a surcharge on the teachers' premiums under the fully insured plan.

REMEDY

The standard remedy for a School Corporation's unfair practice should be applied in this case. Such a remedy should consist of an order requiring the School Corporation to cease and desist its unfair practice, rescinding the unilateral action, and restoring the *status quo ante* as nearly as possible. *MSD of Warren Township*, U-92-51-5360, 1995 IEERB Ann. Rep. 242, 243 (1995), Board *aff'd in pertinent part*, 1995 IEERB Ann. Rep. 246, 247 (1995); *see also Special Services Unit Federation of Teachers v. Board of Directors of the Madison Area Educational Special Services Unit*, 656 N.E.2d 832 (Ind. Ct. App. 1995) (wherein the appropriate remedy was a return to a situation which approximated the *status quo ante*).

CONCLUSIONS OF LAW

¹⁷On the other hand, note that if the self-insured plan is insolvent, as it was in 1998, then the School Corporation is correct in saying that reinsurance reimbursements may be utilized for any purpose. The reason is that under those circumstances the monies for the prepayment of the catastrophic loss must originally come from the general fund rather than from the self-insured plan itself. Since those funds were a part of the general fund rather than the self-insured plan, they retain the same character when they are returned to the School Corporation as a reinsurance reimbursement. Thus, the School Corporation may use such reimbursements for any purpose.

In other words, whether the School Corporation may use reinsurance reimbursements for any purpose will always depend upon the source of the monies which were used to prepay the catastrophic loss in question. If the monies were a part of the self-insured plan itself, then the reinsurance reimbursements must be used to repay the self-insured plan. Conversely, if the monies originated from the general fund (because no funds remained in the self-insured plan), then the reinsurance reimbursements may be used for any school purpose.

- 1. The Indiana Education Employment Relations Board has jurisdiction over the parties and the subject matter of the controversy herein.
- 2. The Respondent violated Sections 4 and 7(a)(5) and (6) of the Act in 1997 by unilaterally changing the past practice as to the use of reinsurance reimbursements. Reinsurance is a component part of a self-insured health plan and is a fringe benefit which is a mandatory subject of bargaining. Therefore, the Respondent committed a refusal to bargain unfair practice.

RECOMMENDED ORDER

- 1. The Respondent is ordered to cease and desist, now and in the future, from refusing to bargain with the Association by taking unilateral action in regard to the use of the reinsurance reimbursements.
- 2. The Respondent is ordered to rescind its action of using the reinsurance reimbursements in 1997 to make three of the School Corporation's routine monthly premium payments.
- 3. To reasonably restore the *status quo ante*, the School Corporation is ordered to pay an amount of money equal to the amount of the three missed monthly premium payments plus interest. The evidence shows that the three missed payments were equal to approximately \$450,000. The money should be paid to the ISTA Insurance Trust in a manner which will benefit exclusively the teachers as they make their contributions to the ISTA Insurance Trust.

Pursuant to the Rules of the Indiana Education Employment Relations Board, and specifically Rule 560 IAC 2-3-21(a), this case is transferred to the Indiana Education Employment Relations Board.

To preserve an objection to the Hearing Examiner's Report, a party must object to the Report in a writing that identifies the basis of the objection with reasonable particularity. Such writing must be filed with the Indiana Education Employment Relations Board within fifteen (15) days after the Report is served on the petitioning party. *See* I.C. 4-21.5-3-29(c) and (d); 560 IAC 2-3-22 and 23.

Dated this	day of August, 2001.	
	Ivan Floyd	

Hearing Examiner

GOLD SEAL